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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-941

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and JOHN A. MURPHY,

Petitioners,

against

JOHN F. LOMBARD,

Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement

Petitioners, pursuant to Rule 24(4) of the Rules of the Supreme Court, submit a reply brief in response to the new issue raised in the Brief in Opposition to the Petition for Certiorari.

Discussion of New Issue

Respondent argues that the principes of *res judicata* should not apply because the constitutional issues involving due process could not have been raised in the state court Article 78 proceeding (Brief in Opposition, pp. 1-3, 6). This is an erroneous statement of New York law. As the

Court of Appeals here properly noted, citing cases, a constitutional issue can be raised in an Article 78 proceeding in the New York state court by treating it as an action for a declaratory judgment (Petitioners' Appendix, p. 13a).

It is well established in New York law that, even if the form of respondent's proceeding were improper, had he raised the appropriate constitutional issues the proceeding could have been treated as one maintained in appropriate form so long as the necessary parties were before the Court. *Matter of Gold,* 29 NY 2d 468, 476, footnote 4, 280 N.E. 2d 640, 644, footnote 4 (1972). It would have been error to dismiss the proceeding. *Kovarsky* v. *Housing & Development Administration,* 31 NY 2d 184, 192, 286 N.E. 2d 882, 886 (1972); *Matter of Phelan* v. *Theatrical Protective Union,* 22 NY 2d 34, 41, 238 N.E. 2d 299 (1968).

Indeed, in *Roosevelt Raceway* v. *County of Nassau,* 18 NY 2d 30, 41, 218 N.E. 2d 539, 544 (1966), the New York Court of Appeals held that the constitutionality of a statute may be tested out in an Article 78 proceeding.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

February 14, 1975.

Respectfully submitted,

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